

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,335

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Appeal of)

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INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare denying his application for Medicaid. The issue is whether the petitioner is disabled within the meaning of the pertinent regulations.

FINDINGS OF FACT

The petitioner is a fifty-one-year-old man with a high school education and work history of heavy construction labor. He has not worked since 1986.

The medical records indicate that the petitioner has a long-standing problem with degenerative disc disease in his lower back. A May, 1992, report from an osteopathic physician who has treated the petitioner intermittently over the years stated that the petitioner "would not be employable at this time" because of his back problems, but that the petitioner should quit smoking and consider back surgery. An internist who examined the petitioner at about the same time (May, 1992) found that the petitioner "cannot sit very long" because of his back pain, and that retraining the petitioner to do sedentary work (which the internist

noted the petitioner was interested in) might not be "particularly practical for him".

A July, 1993, report from the same osteopath as above stated that the petitioner "could go through vocational rehabilitation" for a "light job", but that the petitioner would be precluded from lifting any more than "ten to twenty pounds and only infrequently". This report again indicated that the petitioner did not want to undergo surgery, and that he should stop smoking.

The most up-to-date report is, again, from the same osteopath, who in recent responses to interrogatories posed by the petitioner's attorney noted that the petitioner's degenerative disc disease would allow a maximum of only five pounds lifting, and only half to one hour a day of standing and walking. Also,

uninterrupted sitting was limited to half to one hour. Again, however, this doctor noted that the petitioner's condition might improve if the petitioner would stop smoking. He also urged that the petitioner have a "proper surgical evaluation".

Based on a synthesis of the above reports it must be concluded that the petitioner is precluded from performing any work which requires prolonged sitting, standing, and lifting more than five to ten pounds. Under the regulations (infra) this dictates a finding that the petitioner is disabled.

ORDER

The Department's decision is reversed.

REASONS

Medicaid Manual Section M 211.2 defines disability as follows:

Disability is the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, or combination of impairments, which can be expected to result in death or has lasted or can be expected to last for a continuous period of not fewer than twelve (12) months. To meet this definition, the applicant must have a severe impairment, which makes him/her unable to do his/her previous work or any other substantial gainful activity which exists in the national economy. To determine whether the client is able to do any other work, the client's residual functional capacity, age, education, and work experience is considered.

In this case, even if the petitioner could perform a full range of "sedentary work"⁽¹⁾ (which he can't) he would still be considered "disabled" based on his age, education, and work experience. 20 C.F.R. § 404, Subpart P, Appendix II, Rule 201.12.

At the hearing (but not in the DDS decision) the Department raised the issue of the petitioner having followed medical advice regarding back surgery. Although the evidence (supra) in this regard is problematic, it certainly cannot be concluded that the petitioner has wilfully refused "medical treatment" that could "restore (his) ability to work". See 20 C.F.R. § 416.930. It is well-known that back surgery is often risky and unpredictable. On the basis of the medical evidence presented it cannot be concluded that the petitioner's resistance to surgery (even if it could restore his ability to work) is unreasonable. The Department is, of course, free to pursue further medical evaluation of the petitioner in this regard, and could terminate his medicaid at a later date if it felt that the petitioner was refusing to follow medical advice within the meaning of the regulations.

As of now, however, the medical evidence clearly establishes that the petitioner is disabled.

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1. See 20 C.F.R. § 416.967(a).